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Supreme Court of the United States

OCTOBER TERM, 1994

COMMERCIAL UNION ASSURANCE CO., PLC, COMMERCIAL UNION PENSIONS MANAGEMENT, LTD., GEMINI OVERSEAS CORPORATION, MERCIA ZURICH, A.G., OVERBROOK NOMINEES, LTD. and STRAND NOMINEES, LTD.,

Petitioners,

—against—

MICHAEL R. MILKEN and LOWELL J. MILKEN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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8 pp

QUESTIONS PRESENTED

This case involves the standard for judgment reduction in private actions under the federal securities laws and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), as well as related RICO standing and injury issues.

Departing from this Court's precedent, the Court of Appeals for the Second Circuit introduced a distinct RICO injury requirement of "unrecoverable" loss into Section 1964(c) and, based on that requirement, discharged respondents Michael Milken and Lowell Milken from liability by reducing any eventual jury award against them *pro tanto*, before trebling, in the dollar amount of petitioners' pretrial recoveries from other defendants. By using the *pro tanto* method, the Second Circuit also reduced to zero any potential judgment against the Milkens under the federal securities acts.

The questions presented are:

1. Given this Court's explicit rejection of all special RICO injury restrictions in *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985), should Section 1964(c) be construed to permit private actions only where the plaintiff proves an injury separate from the harm caused by the predicate acts by showing that its loss is "unrecoverable" after exhaustion of all available sources of collection?

2. In light of the unambiguous statutory language of Section 1964(c) and the important deterrence policy embodied in the RICO statute, should a uniform RICO judgment reduction rule be fashioned under which a plaintiff's pretrial recoveries are deducted after trebling the jury award against the nonsettling RICO defendants?

3. Where there has been a complete setoff of any potential RICO damages through pretrial recoveries, should a plaintiff be afforded the opportunity to establish the nonsettling defendants' liability as a predicate for the plaintiff's

entitlement to a Section 1964(c) mandatory attorney's fee award against the RICO violators?

4. In private actions for damages under the federal securities laws, should the proportionate share approach be applied as a uniform judgment reduction rule consistent with the principles that guided the Court's adoption of that approach in *McDermott, Inc.* v. *AmClyde*, 114 S. Ct. 1461 (1994)?

PARTIES TO THE PROCEEDING

The caption of the case in this Court lists all parties to the proceeding. Petitioners Commercial Union Assurance Co., plc, Commercial Union Pensions Management, Ltd., Gemini Overseas Corporation, Mercia Zurich, A.G., Overbrook Nominees, Ltd. and Strand Nominees, Ltd. were plaintiffs-appellants below. Respondents Michael R. Milken and Lowell J. Milken were defendants-appellees below. The statement required by Rule 29.1 is extensive and is set forth at A1 to A8.

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Petitioners,

—against—

MICHAEL R. MILKEN and LOWELL J. MILKEN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Commercial Union Assurance Co., plc, Commercial Union Pensions Management, Ltd., Gemini Overseas Corporation, Mercia Zurich, A.G., Overbrook Nominees, Ltd. and Strand Nominees, Ltd. respectfully request that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit, entered on March 4, 1994, which affirmed the decision of the United States District Court for the Southern District of New York, entered on May 3, 1993, granting summary judgment dismissing this action against respondents Michael R. Milken and Lowell J. Milken.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 17 F.3d 608 (1994). (A9-A27).[1] The order of the Court of Appeals denying a petition for rehearing and suggestion for rehearing *in banc* is unreported. (A35-A36). The opinion of the United States District Court for the Southern District of New York is reported at 824 F. Supp. 348 (1993). (A28-A32).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on March 4, 1994. (A9-A27). The Court of Appeals denied a timely petition for rehearing with suggestion for rehearing *in banc* on April 21, 1994. (A35-A36). This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case applies Section 1964(c) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c); Sections 10(b) and 20 of the Securities Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. §§ 78j(b), 78t; Rule 10b-5 promulgated under the 1934 Act, 17 C.F.R. § 240.10b-5; and Sections 12(2) and 15 of the Securities Act of 1933 (the "1933 Act"), 15 U.S.C. §§ 77l(2), 77o. These provisions are reproduced at A37-A41.

STATEMENT OF THE CASE

1. *Petitioners.* On March 21, 1986, petitioners were fraudulently induced by Michael Milken, Lowell Milken, Ivan

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[1] "A___" refers to the appendix filed with this petition for a writ of certiorari.

Boesky and others to purchase $10.5 million of limited partnership securities in Boesky's arbitrage and merchant banking business. In a securities offering fatally infected by the Milkens' and Boesky's fraud, Commercial Union Assurance Co. plc, Commercial Union Pensions Management, Ltd., Overbrook Nominees, Ltd. and Strand Nominees, Ltd. (collectively "Commercial Union") invested $7,503,175, Gemini Overseas Corporation invested $1,001,927, and Mercia Zurich, A.G. invested $2,006,572. (A13).

2. *Respondents.* Michael Milken, former head of Drexel Burnham Lambert Incorporated's High Yield and Convertible Bond Department, was Ivan Boesky's investment banker. On April 24, 1990, Michael Milken pleaded guilty to six felony charges, including conspiracy to violate the federal securities laws, securities fraud and mail fraud with Boesky. In conjunction with his plea, Michael Milken confessed under oath: "I transgressed certain of the laws and regulations that govern our industry. I was wrong in doing so and knew that at the time, and I am pleading guilty to these offenses."

In 1989, respondent Lowell Milken, a senior Drexel High Yield and Convertible Bond Department employee and Michael Milken's brother, was indicted for securities fraud and RICO violations arising out of his criminal activities with Boesky and Michael Milken. As part of Michael Milken's plea agreement, the United States Attorney discontinued Lowell Milken's prosecution.

3. *The Litigation.* In March 1986, Ivan Boesky reorganized the form of his arbitrage and merchant banking business from a corporation to a limited partnership. The new partnership, known as Ivan F. Boesky & Co., L.P. (the name was subsequently changed to CX Partners, L.P.), was financed by a $1 billion integrated offering of debt securities and limited partnership interests. The Milkens directed the partnership's conception, creation, promotion and capitalization.

On March 21, 1986, petitioners collectively purchased $10.5 million of limited partnership interests based on representations that the activities of Boesky and his businesses were "proper and in compliance with law". Petitioners were not told that Boesky and the Milkens had engaged in criminal violations of the securities laws to systematically manipulate securities prices, make unlawful trading profits, conceal or avoid the Boesky organization's net capital deficiencies and generate phony tax "losses", all of which created the false appearance of a successful business under Boesky's competent management. In November 1986, the government disclosed that Boesky had entered into a plea and cooperation agreement related to his illegal trading activities.

In March 1987, petitioners filed their initial complaint in the United States District Court for the Southern District of New York against Boesky, Drexel, the partnership and others, seeking damages under the federal securities laws and the common law. At the time petitioners filed their original complaint, the Milkens' illegal securities accommodations with Boesky had not fully emerged into public view and the Milkens were not named as defendants in that complaint. In September 1988, the Securities and Exchange Commission commenced an enforcement action that included the massive fraud perpetrated on the partnership's investors by Boesky, Drexel and the Milkens. On January 24, 1989, Drexel pleaded guilty to criminal acts of securities fraud involving Boesky and implicating Michael Milken. In light of the new and additional facts concerning the Milkens' criminal securities arrangement with Boesky revealed by the government's charges and Drexel's guilty plea, petitioners filed a motion to amend their complaint to add the Milkens as defendants on securities, RICO and common law claims. On March 29, 1989, while the amendment motion was pending, a grand jury indicted the Milkens in a 98-count Indictment, which recounted their criminal association with Boesky.

On May 10, 1989, the District Court joined the Milkens as defendants in an amended complaint seeking damages under Sections 10(b) and 20 of the 1934 Act and Rule 10b-5 thereunder,[2] Sections 12(2) and 15 of the 1933 Act, Sections 1962(c), 1962(d), and 1964(c) of RICO (based on securities, mail and wire fraud predicate acts), and the common law. *In re Ivan F. Boesky Sec. Litig.*, 125 F.R.D. 402, 404 (S.D.N.Y. 1989). The jurisdiction of the District Court was invoked under Section 1964 of the RICO statute, 18 U.S.C. § 1964; Section 22 of the 1933 Act, 15 U.S.C. § 77v; Section 27 of the 1934 Act, 15 U.S.C. § 78aa; and 28 U.S.C. § 1331. On June 22, 1989, the Milkens asserted the Fifth Amendment in answer to the complaint.

4. *The Settlement Agreement.* On January 7, 1990, eight months after joining the Milkens as defendants, petitioners recovered an amount approximately equal to their March 1986 capital investment pursuant to an Agreement of Settlement with several defendants, including Drexel and the partnership (the "Settlement Agreement").[3] The Milkens were not parties to the Settlement Agreement and did not contribute to the payments made under it. The payments to petitioners were conditioned on dismissal of their action against Drexel without prejudice, the partnership's satisfaction of $20 million in debt obligations held by Drexel and its affiliate, and the partnership's payment of $300,000 to Drexel for its equity interests in the partnership and its subsidiaries.[4]

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[2] Petitioners' Section 10(b) and Rule 10b-5 cause of action against the Milkens, although cast as an aiding and abetting claim, pleads facts sufficient to allege a primary violation under *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 114 S. Ct. 1439, 1455 (1994).

[3] Commercial Union received $7,482,189, about $21,000 *less* than its $7,503,175 investment. Gemini and Mercia Zurich received the exact amounts of their investments. (A14).

[4] In 1991 and 1992, petitioners recovered additional sums from the Milkens' codefendants, including a settlement with the law firm

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5. *The Milken Global Settlement.* On March 9, 1992, the District Court entered an order in Drexel's Chapter 11 bankruptcy case approving a global settlement of all Drexel-related claims against Michael Milken, Lowell Milken, their family members, associates and investment partnerships. Petitioners opted out of the global settlement, which would have required them to release their claims against the Milkens in return for an unspecified allocation from an inadequate settlement fund, and elected to pursue their litigation to judgment. (A15). Petitioners sought appellate review of the District Court's order approving the global settlement, which compromised their claims against Michael Milken's SEC-administered disgorgement fund. The Second Circuit found that petitioners' objections to the global settlement were premature and affirmed without expressing any view on the merits of those objections. *In re Drexel Burnham Lambert Group Inc.*, 995 F.2d 1138, 1146-47 (2d Cir. 1993). The global settlement became final and effective by order of the District Court issued on September 29, 1993. *In re Michael R. Milken & Assocs. Secs. Litig.*, 1993 U.S. Dist. LEXIS 14242 (S.D.N.Y. Oct. 7, 1993) (unreported).

6. *Summary Judgment.* On May 3, 1993, during the pendency of petitioners' appeal to the Second Circuit from the order approving the Milken global settlement, the District Court held that "the global settlement should not be delayed and further hampered by this litigation" and granted summary judgment dismissing petitioners' claims against the Milkens. (A32).

The District Court found petitioners' RICO claims "insufficient in law", "lack[ing] the existence of an ongoing enterprise separate and apart from the purported pattern of activity asserted" and "flawed by the absence of any foundation for a compensatory recovery". (A31). The District

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and accounting firm defendants, equivalent to prejudgment interest on their claims at the rate of 3.8% per annum. (A14).

Court dismissed the 1934 Act claims by first ruling that out-of-pocket loss is the exclusive Section 10(b) damage measure. The court then equated petitioners' rejection of the Milken global settlement with "oppressive and prolific litigative conduct" to fix prejudgment interest at the noncompensatory rate of 3.8% per annum (the exact amount of petitioners' pretrial recoveries from the Milkens' codefendants). (A30-A32). In dismissing the 1933 Act claims, the District Court restricted Section 12(2) "solicitation" liability to persons in direct communication with the securities purchasers (A31), even though "[p]rivity between the buyer and seller is no longer required in a § 12(2) action." (A26).

At the time the summary judgment motion was determined, the Milkens had not answered the petitioners' newly amended complaint, which the District Court had ordered petitioners to file while the summary judgment motion was pending. Neither the Milkens nor Boesky were deposed by petitioners in the action due to a discovery stay issued by the District Court. (A15, A26-A27).

Although the Court of Appeals affirmed "the district court's grant of summary judgment to defendants, [its] rationale for doing so is different." (A11). The Second Circuit upheld the legal sufficiency of petitioners' securities and RICO claims, but engaged in appellate factfinding to conclude that petitioners had no damages: "[W]hile we have no difficulty in finding that plaintiffs' causes of action might well subject defendants to liability, plaintiffs can prove no damages." (A11).

The Court of Appeals' damage calculations were premised on a factual determination, never made by the District Court, that the January 1990 payments were not settlements, but a return of capital.[5] (A16-A17). The court held

[5] The Court of Appeals' finding that the January 1990 payments were a return of capital, independent of any settlement, is not

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that, to the extent petitioners had recovered their capital investment, they had suffered no compensable RICO injury. Petitioners could only have pursued the RICO treble damages remedy "[i]f a portion or all of their investment in the partnership was *unrecoverable*". (A18, emphasis added). Rejecting precedent in other circuits that "trebling *prior* to any offset is appropriate given the punitive and remedial role of treble damages", the Court of Appeals reduced petitioners' RICO injury *pro tanto*, before any trebling occurred, by the dollar amount of their prior recoveries from the Milkens' codefendants. (A18-A19, emphasis in original). The Second Circuit affirmed the District Court's calculation of prejudg-

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supported by the record. In 1988, the partnership had tried to make non-*pro rata* distributions of capital to selected limited partners, including petitioners, who were not involved with Boesky in illegal activities. Other limited partners, such as Drexel, were excluded from any payments because of their criminal activities with Boesky. Drexel and similarly situated partners filed actions in Delaware Chancery Court to enjoin the non-*pro rata* distributions as violative of the partnership agreement and Delaware partnership law. On April 28, 1988, the Delaware Chancellor entered an injunction prohibiting all payments inconsistent with the partnership agreement's distribution plan absent a settlement with, or judgment against, Drexel and the other partners named as defendants (or potential defendants) in Boesky-related litigation. *Boesky* v. *CX Partners, L.P.*, 1988 Del. Ch. LEXIS 60 at *55 (Apr. 28, 1988) (unreported).

The Court of Appeals' finding that the January 1990 payments were an ordinary course return of capital ignores the Delaware Chancellor's injunction of all such non-*pro rata* distributions absent petitioners' settlement with, or judgment against, Drexel. But for the Settlement Agreement with Drexel and other defendants in this action, petitioners would not have recovered a single dollar in January 1990. Although the Second Circuit has mischaracterized this transaction, the judgment reduction rule under RICO and the securities acts should not turn on whether pretrial recoveries are classified as settlements, restitution, recoupment or otherwise. The court's fundamental error was in holding that different reduction rules apply depending on when a plaintiff obtains recovery (pretrial or postjudgment) and the form the recovery takes (*e.g.* settlement, restitution or recoupment).

ment interest on petitioners' securities law claims at 3.8% per annum and then applied the *pro tanto* method to reduce those claims to zero. (A20-A22, A25).

The Second Circuit thus discharged the Milkens from liability to petitioners, the directly injured victims of the Milkens' well-documented crimes that corrupted the nation's securities markets and subverted those markets for criminal purposes.

REASONS FOR GRANTING THE WRIT

Review by this Court is warranted because the Court of Appeals has rendered a decision on questions of critical importance to parties in civil RICO and federal securities law actions that conflicts with past decisions of this Court, other circuits and at the district court level. Prompt review is essential to provide needed guidance on (a) issues of RICO injury and standing in order to avoid permanent disruption to the RICO statutory scheme caused by the Second Circuit's "unrecoverable" loss injury requirement; and (b) the related issue of judgment reduction in civil RICO and private securities actions, where different rules among the circuits have created a great deal of uncertainty. The decision below is erroneous, and the issues that it addresses are important.

I. THE COURT OF APPEALS' DECISION RESURRECTS THE DISCREDITED RICO INJURY REQUIREMENT IN THE NEW GUISE OF "UNRECOVERABLE" LOSS.

In *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985), this Court rejected the Second Circuit's construction of Section 1964(c) as permitting private actions only where a "racketeering injury" occurred. *Sedima*, 473 U.S. at 481. The Second Circuit had required that a RICO plaintiff allege a " 'racketeering injury'—an injury 'different in kind from that occurring as a result of the predicate acts themselves, or not

simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter.' " *Id.* at 485 (citation omitted). This Court reversed, finding "no room in the statutory language for an additional, amorphous 'racketeering injury' requirement". *Id.* at 495. The Court concluded that the Second Circuit's separate injury requirement eliminated private RICO actions in situations where Congress had provided them, and, as such, was a form of statutory amendment not appropriately undertaken by the courts. *Id.* at 500.[6]

In this case, the Second Circuit has resurrected the racketeering injury requirement *Sedima* rejected. The Court of Appeals held that "damages as compensation under RICO § 1964(c) for injury to property must, under the familiar rule of law, place appellants in the same position they would have been in but for the illegal conduct." (A18). To satisfy this "familiar rule of law", plaintiffs in the Second Circuit must suffer a distinct RICO injury, defined as "unrecoverable" loss, before their civil RICO claim will accrue. (A18). According to the Second Circuit, a RICO injury arises only if a portion or all of the plaintiff's damages are "unrecoverable" after exhausting all available sources of collection. (A18).[7] Such a

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[6] *See also American National Bank & Trust Company of Chicago* v. *Haroco, Inc.*, 473 U.S. 606, 609 (1985) (applying *Sedima* to reject "a variation on the racketeering injury concept").

[7] The Second Circuit derives its "unrecoverable" loss requirement from its holding in *Stochastic Decisions, Inc.* v. *DiDomenico*, 995 F.2d 1158 (2d Cir.), *cert. denied*, 114 S. Ct. 385 (1993), which is a RICO case for contingent lost-debt damages. A debt is "lost", and thereby becomes a predicate for RICO trebling, only if "it is established that collection of the claim or judgment has been successfully frustrated" by a RICO violation. *Id.* at 1166. Distinguishing other courts' decisions requiring offset after trebling, the *Stochastic* court held that "[n]one of these cases involved . . . a RICO violation whose central purpose was to prevent the collection of a claim or judgment. Accordingly, they do not provide reliable guidance for the resolution of the 'lost debt' issue presented by this appeal." *Id.* Because the plaintiff's collection of several outstanding judgments

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requirement is fundamentally irreconcilable with *Sedima*. *Sedima*, 473 U.S. at 495.

Sedima requires no injury beyond that resulting from the RICO predicate acts. *Sedima*, 473 U.S. at 495, 500. "Any recoverable damages occurring by reason of [a substantive RICO violation] will flow from the commission of the predicate acts." *Id.* at 497 (footnote omitted). In cases like this one, where petitioners acquired interests in a limited partnership in reliance on fraudulent offering materials, the injury to petitioners is the actual purchase of the partnership interests. Measured at the time of purchase, when the injury occurred, *Grondahl* v. *Merritt & Harris, Inc.*, 964 F.2d 1290, 1294 (2d Cir. 1992), a jury could find that the partnership securities bought by petitioners were worthless, and award the full purchase price. *See Randall* v. *Loftsgaarden*, 478 U.S. 647, 662 (1986). Petitioners' injury flowing from the commission of the securities, mail and wire fraud predicate acts was neither contingent nor dependent on their subsequent ability to recover their damages, after the predicate acts had accrued, from any available source.

In the Second Circuit today, however, a plaintiff's RICO claim predicated on injury from securities, mail and wire fraud will not ripen until part or all of its underlying investment is proved worthless and its damages are finally determined to be uncollectible. The Second Circuit's decision will inevitably interject tremendous uncertainty into RICO claim accrual. The RICO limitations clock will not start running under this decision until there is *no* possibility that a RICO plaintiff may recoup his losses from any source. *See e.g.*, *First Nationwide Bank* v. *Gelt Funding Corp.*, 1994 U.S. App. LEXIS 14436 at *11 (2d Cir. June 9, 1994) (dismissing a RICO claim as premature under the holding in this case and

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had not been successfully frustrated when the complaint in *Stochastic* was filed, the "lost debt" RICO claim presented in that case was premature.

in *Stochastic*: "a plaintiff who claims that a debt is uncollectible because of the defendant's conduct can only pursue the RICO treble damages remedy after his contractual rights to payment have been frustrated").

Under the Second Circuit's reasoning, if petitioners had not recovered from the Milkens' codefendants in January 1990, their RICO claims still would not have accrued, even though some predicate acts date back to 1984. Thus, petitioners' RICO claims would have remained inchoate until the partnership had liquidated, distributed its assets and it was finally determined whether those assets (together with any other possible sources of collection) were insufficient to return petitioners' capital. Because the "unrecoverable" loss concept is so amorphous, RICO plaintiffs will not know how quickly they must enforce their rights, guaranteeing an explosion of collateral litigation and potentially resulting in the late filing and barring of claims. The decision thus promotes a RICO claim accrual rule that defeats the purpose behind this Court's adoption of a uniform RICO statute of limitations—the elimination of "intolerable uncertainty and time-consuming litigation". *See Agency Holding Corp.* v. *Malley-Duff & Assoc. Inc.*, 483 U.S. 143, 150 (1987) (internal quotation marks and citation omitted).

The Second Circuit's conclusion that petitioners did not suffer injury (and thus there was nothing to treble) because they had recovered an amount roughly equal to their capital from the Settlement Agreement with the Milkens' codefendants[8] conflicts with this Court's decisions under the analytically similar federal antitrust laws. An antitrust defendant cannot assert as a defense that the plaintiff suffered no "injury" because it recouped its losses by passing on illegal overcharges to consumers. *See Hawaii* v. *Standard Oil Co. of California*, 405 U.S. 251, 262-63 n.14 (1972); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481,

[8] Commercial Union actually recovered $21,000 *less* than its invested capital under the Settlement Agreement. (A14).

493-94 (1968). The Seventh Circuit has applied this antitrust principle to RICO cases, "not the least because the damages provision in § 1964(c) is practically verbatim the damages provision in the antitrust laws." *Carter* v. *Berger*, 777 F.2d 1173, 1175-76 (7th Cir. 1985). Where a RICO plaintiff is deprived of money lawfully due, there is no basis for concluding that "the victim of a fraud is not an aggrieved party simply because he obtains compensation from another source." *Id.* at 1176 (internal quotation marks and citation omitted). "[T]he wrongdoer should be made to pay—the better to deter like conduct—whether or not the victim has providently supplied another source of compensation". *Id.* at 1175.[9]

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[9] Other decisions of the Seventh Circuit and at the district court level are to the same effect. *See Mosler* v. *S/P Enters., Inc.*, 888 F.2d 1138, 1144 (7th Cir. 1989) (the "goal of RICO would be defeated" if a victim is forced to choose between foreswearing restitution and forfeiting treble damages to obtain it); *Liquid Air Corp.* v. *Rogers*, 834 F.2d 1297, 1310 (7th Cir. 1987), *cert. denied*, 492 U.S. 917 (1989) (defendants' return of plaintiff's property after trial "does not negate the frauds perpetrated by defendants"); *Lehighton Area School District* v. *Gilbert*, 787 F. Supp. 429, 432 (M.D. Pa. 1992) (defendants' return of tax funds misappropriated from plaintiff had "absolutely no effect" on plaintiff's right to sue under RICO); *Minpeco, S.A.* v. *Hunt*, 718 F. Supp. 168, 183 (S.D.N.Y. 1989) (reduction of plaintiff's RICO damages by the amount of a loan assumed by a third-party would improperly exonerate defendants from liability for their acts "because others chose to or had to aid the injured party"); *In re National Mortgage Equity Corp. Mortgage Pool Certificates Sec. Litig.*, 636 F. Supp. 1138, 1151-52 (C.D. Cal. 1986) (plaintiffs' RICO claims were not discharged even though the securities fraud predicate offenses were completely satisfied before the litigation began); *Pennsylvania* v. *Cianfrani*, 600 F. Supp. 1364, 1367 (E.D. Pa. 1985) (analogizing from antitrust overcharge cases in which treble damages are not discharged by recoupment of the actual loss to reach the same result under RICO; plaintiff's recoupment of embezzled funds by withholding retirement funds payable to the wrongdoer did not bar a RICO treble-damages award reduced, after trebling, by the prior withholding).

This Court has often emphasized that "RICO is to be read broadly" and "liberally construed to effectuate its remedial purposes." *Sedima*, 473 U.S. at 497-98 (internal quotation marks and citation omitted). "The statute's 'remedial purposes' are nowhere more evident than in the provision of a private action for those injured by racketeering activity." *Id.* at 498. The Second Circuit has not liberally construed RICO, but rather liberally rewritten the Act, to "in effect eliminate § 1964(c) from the statute" through its "unrecoverable" loss injury requirement. *Id.*

II. THE COURT OF APPEALS' RICO JUDGMENT REDUCTION RULE CONFLICTS WITH THE ACT'S LANGUAGE, ITS LEGISLATIVE HISTORY AND THE RULE OTHER COURTS ENDORSE IN MULTIPLE DAMAGES ACTIONS.

RICO's treble damages provision is found in Section 1964(c), which authorizes "any person" injured by a violation of the Act's substantive provisions to sue and "recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c). Section 1964(c) speaks of trebling damages; single damages are not a possibility. A court or jury has no option in the event of a verdict against the defendant, but is required to award treble damages, costs and attorney's fees. *Cullen* v. *Margiotta*, 811 F.2d 698, 713 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987) ("civil RICO requires that a successful plaintiff be awarded treble damages"). Thus, a Section 1964(c) claim cannot be satisfied by the award of a sum that, when added to prior recoveries, totals less than three times the jury's damages award.

Despite the plain language of the RICO statute,[10] the Second Circuit has adopted a judgment reduction rule that in

[10] "If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language

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effect makes single damages a measure of recovery under Section 1964(c):

> . . . [D]amages as compensation under RICO § 1964(c) for injury to property must, under the familiar rule of law, place [petitioners] in the same position they would have been in but for the illegal conduct. Here [petitioners] have already been placed by defendants [other than the Milkens] in that position. Hence, in the instant case, without provable damages, no viable RICO cause of action may be maintained.

(A18). However, Congress did not write the statute that way. The plain language of Section 1964(c), which mandates treble-damages awards to successful RICO plaintiffs, is irreconcilable with the Second Circuit's restriction of a RICO plaintiff's damages to the amount sufficient to return that plaintiff "to the same position [it] would have been in but for the illegal conduct." (A18).

Applying this flawed single-damages construction of Section 1964(c), the Second Circuit concluded that prejudgment restitution and recoupment abate a plaintiff's RICO claim *before* trebling, while settlements, post-judgment restitution and post-judgment recoupment are deducted *after* trebling. (A17). This approach leads to the anomalous result that every dollar recovered through prejudgment restitution or recoupment causes a three dollar reduction in the RICO judgment, while every settlement or post-judgment dollar of recovery reduces the RICO judgment by one dollar only.[11]

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must ordinarily be regarded as conclusive." *United States* v. *Turkette*, 452 U.S. 576, 580 (1981) (internal quotation marks and citation omitted).

[11] The classification of a plaintiff's out-of-court recoveries can lead to vastly different outcomes under the Second Circuit's construction of Section 1964(c). If the Second Circuit had made the factual determination that the January 1990 payment was a

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Courts outside the Second Circuit uniformly apply the same judgment reduction rule in all RICO treble-damages actions, whether or not the plaintiff's recoveries are made before or after judgment, and whether or not they are labelled settlements, restitution, recoupment or otherwise. *See* D. Smith and T. Reed, *Civil RICO* ¶ 10.03[3] (1994) (citing cases). To ensure that the RICO plaintiff receives complete satisfaction of his RICO claims and to carry out the important deterrence policy embodied in the Act, a plaintiff's recoveries are deducted *after* trebling the jury's award, regardless of how they may be classified.

The Second Circuit found that petitioners' reliance on the Seventh Circuit's decision in *Liquid Air Corp.* v. *Rogers*, 834 F.2d 1297 (7th Cir. 1987), *cert. denied*, 492 U.S. 917 (1989), "suggest[ing] that trebling *prior* to any offset is appropriate given the punitive and remedial role of treble damages" and "other similar non-controlling cases is misplaced." (A18-A19). The court sought to distinguish *Liquid Air* solely on the ground that the defendants in that case "returned the property at issue *after* a RICO judgment had been entered against them", while petitioners "received their capital investment back in full less than ten months from the time they commenced suit" against the Milkens. (A18, emphasis in original). The Second Circuit summarily rejected the decisions of

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settlement, petitioners would have been entitled to nearly $20 million in potential RICO damages (*i.e.*, their $10.5 million investment, trebled, and then reduced by their pretrial recoveries). Petitioners would also be entitled to an attorney's fee award if they proved successful on their RICO claim. Instead, the Second Circuit held that the January 1990 payment was a return of capital independent of any settlement and, based entirely on that appellate finding of fact, the court concluded that petitioners suffered no compensable RICO damages.

other courts, offsetting pretrial restitution and recoupment after trebling, without analysis.[12] (A18-A19).

The Second Circuit's emphasis on the classification of a plaintiff's recoveries places a premium on litigation by discouraging all but global out-of-court resolutions in RICO actions. As RICO defendants seek to take advantage of the court's favorable offset rule for pretrial restitution and recoupment, treble-damages actions will become weighted down in collateral litigation over the label that attaches to the plaintiff's recovery, disregarding this Court's admonition, in the antitrust context, that "it [would be] an unwarranted and counterproductive exercise to litigate a series of exceptions." *Kansas* v. *Utilicorp United, Inc.*, 497 U.S. 199, 217 (1990).[13]

The judgment reduction rule applied under antitrust law, on which Section 1964(c) was modelled,[14] *Sedima*, 473 U.S. at 485, 489, is consistent with the Seventh Circuit's approach and in conflict with the approach that has now gained

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[12] *See e.g.*, *Lehighton Area School District*, 787 F. Supp. at 432 (restitution of misappropriated tax funds before complaint was filed); *In re National Mortgage Equity Corp. Mortgage Pool Certificates Sec. Litig.*, 636 F. Supp. at 1152 (third-party payments before the complaint was filed); *Cianfrani*, 600 F. Supp. at 1367-68 (recoupment of losses from third-parties before suit was instituted).

[13] The Second Circuit's decision provides no guidance on how to distinguish among the many variations of prejudgment recoveries plaintiffs may achieve. *See* Black's Law Dictionary (6th ed. 1990) at 1372 defining "settle" as a "word of equivocal meaning". The weight the Second Circuit places on a "word of equivocal meaning" produces a rule that is impossible to apply with any predictability.

[14] "Congress modelled § 1964(c) on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act. . . . We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's § 4. . . . It used the same words, and we can only assume it intended them to have the same meaning that courts had already given them." *Holmes* v. *Securities Investor Protection Corp.*, 112 S. Ct. 1311, 1317-18 (1992).

currency in the Second Circuit. In antitrust law, a purchaser from an illegal cartel recovers "from the wrongdoer the full overcharge, trebled, even if it also recovered the whole overcharge by raising its own prices." *Carter*, 777 F.2d at 1175, *citing Hanover Shoe, Inc.*, 392 U.S. at 493-94. Offsets are calculated after trebling the verdict because "satisfaction would not be achieved by the award of any sum, which added to the settlement sum, did not total [three times the jury award]. . . . Any other method would have resulted in plaintiffs receiving less than the whole to which they were entitled." *Flintkote Co.* v. *Lysfjord*, 246 F.2d 368, 398 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957).[15]

The Court of Appeals' approach also conflicts with the judgment reduction rule applied in multiple damages actions brought under the False Claims Act, 31 U.S.C. § 3729, *et seq.* In *United States* v. *Bornstein*, 423 U.S. 303 (1976), this Court doubled the government's actual damages under the False Claims Act before subtracting compensatory payments received from other sources. *Id.* at 314, 316.[16] By doubling the damages before deducting compensatory payments, the Court found that the deterrent impact of the statutory double-damages provision was maximized, while the relative rights and liabilities of the respective parties were fixed with precision.

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[15] *See also Burlington Indus., Inc.* v. *Milliken & Co.*, 690 F.2d 380, 393 (4th Cir. 1982) *cert. denied*, 461 U.S. 914 (1983) (" 'one purpose of the trebling provision is to encourage private plaintiffs to bring suit. Any ultimate recovery totalling less than three times proven damages would weaken the statutory incentive through judicial construction.' ") (*quoting Hydrolevel Corp.* v. *Am. Society of Mech. Engineers, Inc.*, 635 F.2d 118, 130 (2d Cir. 1980), *aff'd*, 456 U.S. 556 (1982)).

[16] In 1986, the False Claims Act was amended to provide for the recovery of treble damages. Courts interpreting the Act following its amendment apply *Bornstein* to deduct prejudgment recoveries *after* trebling the jury's award. *See e.g.*, *United States* v. *Entin*, 750 F. Supp. 512, 519-20 (S.D. Fla. 1990).

> First, this method of computation comports with the congressional judgment that double damages are necessary to compensate the Government completely for the costs, delays, and inconveniences occasioned by fraudulent claims. Second, the rule that damages should be doubled prior to any deductions fixes the liability of the defrauder without reference to the adventitious actions of other persons. . . . Third, the reasoning of the Court of Appeals and the District Court would enable the [wrongdoer] to avoid the Act's double-damages provision by tendering the amount of the undoubled damages at any time prior to judgment. This possibility would make the double-damages provision meaningless. Doubling the Government's actual damages before any deduction is made for payments previously received from any source in mitigation of those damages forecloses such a result.

Id. at 315-16 (footnotes omitted).

Bornstein's reasoning is equally compelling here. *First*, the "full satisfaction to which [RICO] treble damage claimants are entitled is three times the proven actual damages—any award less than that amount constitutes an incomplete recovery." *In re National Mortgage Equity Corp. Mortgage Pool Certificates Sec. Litig.*, 636 F. Supp. 1138, 1152 (C.D. Cal. 1986) (internal quotation marks omitted). *Second*, the rule that damages should be trebled prior to any deductions fixes the liability of the RICO offender without reference to "whether or not the victim has providently supplied another source of compensation." *Carter*, 777 F.2d at 1175. *Third*, the Second Circuit's reasoning "would enable any person guilty of violating § 1962 to avoid the imposition of treble damages by the simple device of making restitution before the injured person brings suit." *Pennsylvania* v. *Cianfrani*, 600 F. Supp. 1364, 1367 (E.D. Pa. 1985). This possibility would, in the

Bornstein Court's words, make the RICO treble damages provision "meaningless".

"The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981) (holding that there is no right to contribution under the federal antitrust laws). In the absence of any possibility that Congress was concerned with "softening the blow on wrongdoers" under RICO, *id.* at 639, a RICO violator should not be permitted to escape treble-damages liability by the fortuitous presence of another source of payment to the injured party. Although Congress did not create, and courts have declined to find, a right of contribution or indemnification in a civil RICO action,[17] the Second Circuit has nevertheless fashioned a federal common law of RICO contribution and indemnity through its special injury requirement and judgment reduction methodology. This result, which stands as an obstacle to the accomplishment and execution of Congress' purposes and objectives, is preempted by RICO. Indemnification of the Milkens dilutes the impact of RICO's treble damages, negating the punishment, in contravention of Congressional intent.

The Second Circuit's judgment reduction rule creates, in effect, a sanctuary for RICO offenders. A RICO offender can avoid treble damages by simply tendering payment of the plaintiff's out-of-pocket loss at any time before judgment. Indeed, the RICO defendant would not even have to tender payment, so long as the court believed that the plaintiff can find another way to collect the underlying loss. By merely restoring the RICO

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[17] The lower courts are in substantial agreement that no right to indemnification or contribution, express or implied, arises under RICO. *See e.g.*, *Friedman* v. *Hartmann*, 787 F. Supp. 411, 417-18 (S.D.N.Y. 1992) (collecting cases); *Andrews* v. *Fitzgerald*, [1991-1992 Transfer Binder] (CCH) Fed. Sec. L. Rep. ¶ 96,628 at 92,944 (M.D. N.C. 1992) (collecting cases); *Seminole Electric Cooperative, Inc.* v. *Tanner*, 635 F. Supp. 582, 583-84 (M.D. Fla. 1986).

offender and RICO plaintiff to their original positions (A18-A19), the Second Circuit's offset rule defeats RICO's remedial and deterrent purposes. "Stated another way, even a convicted Mafia defendant could escape civil liability for the harm done his intended victim". *Bankers Trust Co.* v. *Rhoades*, 741 F.2d 511, 522 (2d Cir. 1984) (Cardamone, J., dissenting), *vacated and remanded*, 473 U.S. 922 (1985).

III. THE COURT OF APPEALS' RICO JUDGMENT REDUCTION RULE WRONGLY EXONERATES RICO VIOLATORS FROM STATUTORY LIABILITY FOR ATTORNEY'S FEES.

Under Section 1964(c), Congress made the attorney's fee award against RICO violators mandatory. 18 U.S.C. § 1964(c). The statutory fee award "is an integral part of the relief sought by the civil RICO plaintiff." *Alcorn County* v. *U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1165 (5th Cir. 1984). Regardless of whether there has been a complete setoff of potential damages through pretrial recoveries, a RICO plaintiff must be afforded an opportunity to establish by trial, if necessary, the defendant's liability as a predicate for the plaintiff's entitlement to the statutory fee award. *See Auwood* v. *Harry Brandt Booking Office, Inc.*, 850 F.2d 884, 894 (2d Cir. 1988) (setoffs are not applied against an antitrust fee award). The Second Circuit's opinion affirming summary judgment denied petitioners this opportunity. The decision is thus in conflict with decisions in the Third and Fifth Circuits awarding attorney's fees under the antitrust law, on which Section 1964(c) was modelled, *see Holmes*, 112 S. Ct. at 1317-18; *Agency Holding Corp.*, 483 U.S. at 150-52; *Sedima*, 473 U.S. at 485, 489.

In *Gulfstream III Assocs., Inc.* v. *Gulfstream Aerospace Corp.*, 995 F.2d 414, 419 (3d Cir. 1993), a case arising under Section 4 of the Clayton Act, the defendant argued that,

because the plaintiff's entire $3 million treble-damages award was offset by prior settlements, the plaintiff was not a "prevailing party" entitled to recover attorney's fees. *Gulfstream*, 995 F.2d at 418-19. The Third Circuit rejected this argument, holding that an antitrust plaintiff can recover attorney's fees even though the trebled verdict was entirely offset by prior recoveries. " '[A]n antitrust defendant that causes injury should not be spared liability for attorneys' fees simply because a previous settlement turns out in retrospect to preclude a compensatory damage award.' " *Id.* at 419, *quoting Sciambra* v. *Graham News*, 892 F.2d 411, 416-17 (5th Cir. 1990). Any other holding would not only deter the private prosecution of antitrust violations, which is a critical element in the antitrust enforcement scheme and the primary reason that attorney's fees are mandatory under the statute, but could also deter plaintiffs from partial settlements. A plaintiff must be permitted to establish liability at trial even when a fee award is the only remaining relief at issue. *Id.* at 418-19.

In *Sciambra*, on which the Third Circuit relied in *Gulfstream*, the plaintiff conceded that his Clayton Act damages were less than the amount of his prior settlements. The district court did not award damages, but did enter judgment for attorney's fees. Affirming the award, the Fifth Circuit found that statutory attorney's fees are not dependent on a compensatory damages award: "the effect of the [prior] settlement on [plaintiff's] recovery of compensatory damages has no effect on [plaintiff's] right to recover attorneys' fees." *Sciambra*, 892 F.2d at 416.

The same result is compelled under RICO's Section 1964(c). Regardless of whether there has been a complete setoff of petitioners' potential RICO damages, they must be permitted to prove the Milkens' RICO liability as a predicate for their entitlement to statutory attorney's fees.

IV. THE COURT OF APPEALS ERRED BY APPLYING THE *PRO TANTO* JUDGMENT REDUCTION RULE TO CALCULATE THE NONSETTLING TORTFEASORS' LIABILITY UNDER THE SECURITIES ACTS.

Applying the "one satisfaction rule", the Court of Appeals deducted petitioners' pretrial recoveries *pro tanto* from any eventual judgment they may have obtained against the Milkens under the securities acts. (A22, A24-A25). Use of the *pro tanto* method completely discharged the Milkens from liability for their securities law violations.

On April 20, 1994, one day before the Court of Appeals issued its decision denying petitioners' motion for rehearing and suggestion for rehearing *in banc*, this Court decided *McDermott, Inc.* v. *AmClyde*, 114 S. Ct. 1461 (1994). The question presented in that admiralty case was

> whether the liability of the non-settling defendants should be calculated with reference to the jury's allocation of proportionate responsibility, or by giving the nonsettling defendants a credit for the dollar amount of the settlement.

Id. at 1463. *McDermott* held that "the proportionate approach is the correct one", based on three considerations: (a) promotion of settlement; (b) judicial economy; and (c) consistency with the proportionate fault approach used to apportion damages in maritime cases. *Id.* at 1463, 1466-67. The proportionate share approach that *McDermott* applied in admiralty is also the correct approach in private securities actions.

For the same reasons that the Court identified in *McDermott*, neither the *pro tanto* nor the proportionate fault approach offers a clear advantage in promoting settlements or advancing judicial economy in securities cases. *McDermott*, 114 S. Ct. at 1468-70. However, proportionate fault is the

reduction method that best comports with the mechanics and objectives of the securities acts.

The primary policy embedded by Congress in the securities acts is the punishment and deterrence of securities violations. *See Randall*, 478 U.S. at 659 (the 1933 Act's Section 12 rescissory remedy "adds an additional measure of deterrence as compared to a purely compensatory measure of damages"); *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 386-87 (1983) ("[i]n enacting the 1934 Act, Congress stated that its purpose was to impose requirements necessary to make [securities] regulation and control reasonably complete and effective") (internal quotation marks and citation omitted). Promoting compliance with the securities laws is best served when each defendant is held responsible for its actions. *See Franklin* v. *Kaypro Corp.*, 884 F.2d 1222, 1227 (9th Cir. 1989), *cert. denied*, 498 U.S. 890 (1990) ("the overarching purpose [of the securities laws] was to restore confidence in the market" by holding "accountable all parties").

The proportionate share method achieves this objective by apportioning liability based on each defendant's relative culpability. *See Kaypro*, 884 F.2d at 1231. Because this approach resonates with the securities acts' use of civil liability as an enforcement mechanism, it is the most effective means of accomplishing Congress' goal of promoting compliance by making each wrongdoer pay for the damages it has caused. *See* P. Nichols, *Symmetry and Consistency and the Plaintiff's Risk: Partial Settlement and the Right of Contribution in Federal Securities Actions*, 19 Delaware Journal of Corporate Law 1, 45 (1994).

By contrast, the *pro tanto* rule, adopted by the Second Circuit (A25), is constructed around notions of compensation to the plaintiff. *See Singer* v. *Olympia Brewing Co.*, 878 F.2d 596, 600 (2d Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990). *Pro tanto* crediting means that partial settlement does not carry with it the risk that the plaintiff will ultimately recover

less than the full amount of his damages found at trial. A plaintiff risks nothing by settling because he may collect the full amount of the damage award regardless of whether the prior settlement reflected an accurate picture of the economic harm caused by the settling tortfeasor. This can lead to an inequitable result when one defendant is forced to pay damages far in excess of the proportionate share of the harm it caused, or, conversely, when a wrongdoer is exonerated from liability commensurate with its culpability.

The overriding purpose of the federal securities laws is "preventative rather than redressive". H. Shulman, *Civil Liability and the Securities Act*, 43 Yale L. J. 227 (1933). The civil liabilities imposed are not merely compensatory in nature, but are the tools Congress chose to secure accuracy in the information investors receive and promote the *in terrorem* function of the securities acts. *See Securities and Exchange Commission* v. *Capital Gains Research Bureau*, 375 U.S. 180, 198 (1963). Compensation *qua* compensation (the internal premise of the *pro tanto* approach) is simply not the securities acts' primary function.

The strongest argument for the *pro tanto* approach is that it adheres to the "one satisfaction rule", which provides that "a plaintiff is entitled to only one satisfaction for each injury." *Singer*, 878 F.2d at 600. "It is not entirely clear that the one satisfaction rule applies in [the context of the federal securities acts]. The rule is based in common law; it is not statutorily mandated." *Kaypro*, 884 F.2d at 1232. *See Randall*, 478 U.S. at 663 ("this Court has never interpreted § 28(a) [of the 1934 Act] as imposing a rigid requirement that every recovery on an express or implied right of action under the 1934 Act must be limited to the net economic harm suffered by the plaintiff").

Rejecting the argument that the "one satisfaction rule" precludes proportionate fault crediting, this Court held in *McDermott* that "[t]he law contains no rigid rule against overcompensation." *McDermott*, 114 S. Ct. at 1470.

> It seems to us that a plaintiff's good fortune in striking a favorable bargain with one defendant gives other defendants no claim to pay less than their proportionate share of the total loss. In fact, one of the virtues of the proportionate share rule is that, unlike the *pro tanto* rule, it does not make a litigating defendant's liability dependent on the amount of a settlement negotiated by others without regard to its interests.

Id. at 1471. "[M]aking tortfeasors pay for the damages they cause can be more important than preventing overcompensation". *Id.* at 1470-71.

Only the proportionate fault method makes tortfeasors pay for the damages they cause by matching liability for securities law violations with relative culpability. The Second Circuit's use of *pro tanto* crediting to exonerate the Milkens from liability to petitioners, the victims of their securities crimes, is the best evidence that the proportionate share approach (under which the Milkens pay according to their relative culpability) is the correct standard for federal securities actions.

Although the Second and Ninth Circuits may disagree on the appropriate judgment reduction approach,[18] they concur in the need for a uniform federal rule in securities litigation. *Kaypro*, 884 F.2d at 1228-29; *Singer*, 878 F.2d at 599-600.

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[18] Not only have two influential circuits failed to agree on a singular judgment reduction method, but the district courts are divided as well. *Compare United States Fidelity & Guaranty Co.* v. *Patriot's Point Development Authority*, 772 F. Supp. 1565, 1577 (D. S.C. 1991); *Alvarado Partners, L.P.* v. *Mehita*, 723 F. Supp. 540, 553 (D. Colo. 1989), *appeal dismissed*, 936 F.2d 582 (10th Cir. 1991); *In re Sunrise Sec. Litig.*, 698 F. Supp. 1256, 1261 (E.D. Pa. 1988) (adopting proportionate method), *with In re Jiffy Lube*, 772 F. Supp. 890, 894 (D. Md. 1991); *MFS Municipal Income Trust* v. *American Medical Int'l, Inc.*, 751 F. Supp. 279, 287 (D. Mass. 1990) (following *pro tanto* rule).

Consistent with the principles enunciated in *McDermott* and the policies underlying the securities acts, proportionate fault should be that uniform rule. Applying a national rule in the securities context will avoid disparate results in different circuits, forum shopping, conflict of laws litigation and the ensuing unpredictability that now perplexes the federal regulatory scheme.

CONCLUSION

The Milkens' discharge from liability to petitioners by operation of the Second Circuit's special RICO injury and judgment reduction rules is error. This petition presents the Court with an opportunity to provide needed guidance on the correct judgment reduction approach under RICO and the federal securities laws, and to avoid disruption of the RICO statutory scheme engendered by the Second Circuit's resurrection of a separate RICO injury requirement.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: July 18, 1994

Respectfully submitted,

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APPENDICES

APPENDIX A

STATEMENT PURSUANT TO RULE 29.1

There are no parent companies, subsidiaries or affiliates of Gemini Overseas Corp. or Mercia Zurich, A.G. that have issued shares to the public. Commercial Union Assurance Co. plc; Commercial Union Pensions Management Ltd.; Overbrook Nominees Ltd. and Strand Nominees Ltd. make the following disclosure:

COMMERCIAL UNION GROUP COMPANIES

PARENT COMPANY
Commercial Union plc

SUBSIDIARIES
Commercial Union Assurance Company plc (in which is merged the Hand-in-Hand Fire and Life Insurance Society) and Commercial Union Financial Holdings Limited are the principal subsidiaries of the Company and their subsidiaries (except wholly owned subsidiaries) are:

UNITED KINGDOM
A.R.P. Exhibitions Limited
A.R.P. Financial Services Limited
A.R.P. Publishing Limited
Retirex Limited

AUSTRALIA
90 Arthur Street Pty. Limited
91 City Road Pty. Limited
AMIC Pty. Limited (in liquidation)
Australian Mortgage Insurance Corporation Investments Pty. Ltd.
Australian Mutual Fire Insurance Society Limited (in liquidation)
Australian Premium Finance Pty. Ltd.
C.U. (Aust) Limited (in liquidation)

Commercial Union Assurance Company of Australia Limited
Commercial Union Australia Mortgage Insurance Corporation Limited
Commercial Union Properties Pty. Limited
Commercial Union Pty. Ltd.
Commercial Union Workers Insurance (Vic) Pty. Ltd.
Commercial Union Workers' Compensation N.S.W. Limited
CU Travel and General Insurance Ltd.
CUA Trading Pty. Ltd.
CUGroup Proprietary Limited
The Insurance Office of Australia Limited
National Commercial Union Limited
National Mutual Fire Insurance Company Limited (in liquidation)
Sackville Estates (Queensland) Pty. Limited
Swann Insurance (Aust.) Pty. Ltd.
T & G General Insurance Australia Limited
Union Insurance Company Limited

BELGIUM

BVBA Verzekerings-En Geldlenings-Kantoor Jan Smeyers & Zonen
Commercial Union Belgium Life, N.V.
Commercial Union Belgium, N.V. S.A.
Corporate & Personal Financial Services N.V. (Belgium)
Cuprop, S.A. N.V.
Delta Lloyd Immobilien N.V.
Nisin S C
S.C. Assurances Rino Minucci
S.C. Bureau Courtage Azzini
S.C. Bureau D'Assurances Bertin
S.P.R.L. Cailliau-Leman
S.P.R.L. Hougardy Conard
Vanderhaegen-Vanderstraeten, N.V.

BRAZIL

Commercial Union do Brasil Seguradora S.A.

CYPRUS

Commercial Union Assurance (Cyprus) Limited
Medrisk Management Services Limited

EIRE

Hibernian Insurance Management Services Limited

FRANCE

Agirp SARL
C.U. Gestion G.I.E.
CNEC
Commercial Union Assurances
Commercial Union France SA
Croissance Immo 2 SCPI
Croissance Immobiliere Sicav
Croissance Mercure Sicav
Croissance Pierre 2 S.A.
Croissance Plus Sicav
Croissance SN.C.
Eurofil SA
Fonciere Prony SARL
L'Epargne de France S.A.
Office de Credits Hypothecaires S.A.
Royal St. Georges Banque SA
S.I.H.R.F. SARL
SA Armand
SA Fronsac
SA la Rochelle
SA le Cardinal
SA Lucon
Saint Georges Gestion S.N.C.
SC de la Ferme de Bourgogne
SC de la Grande Ferme de Gournay
SC de Limoron
SC de Pillebourse
Societe Civile Immobiliere Capimmo
Societe Civile Immobiliere Croissance Patrimmo
Societe Civile Immobiliere Croissance Pierre

Societe Civile Immobiliere Danton Aufan Kleber
Societe Civile Immobiliere de la Rouvraie Ouest
Societe Civile Immobiliere du 20-26 BD du Parc
Societe Civile Immobiliere du 36 Rue Ampere
Societe Civile Immobiliere du 42 Avenue de la Grande Armee
Societe Civile Immobiliere du 63-65-67 Rue du Gros Horloge
Societe Civile Immobiliere du Centre Commercial de la Place de la Paix
Societe Civile Immobiliere du Plessis
Societe Civile Immobiliere les Micocouliers
Societe Civile Immobiliere Pont du Riquet
Societe Civile Immobiliere Prony-Jouffroy
Societe Civile Immobiliere Richelieu
Societe Civile Immobiliere Sully Tete D'Or
Societe Civile Immobiliere V.I.P.

ISLE OF MAN
Solicitors Mutual Indemnity Company Limited

ITALY
Commercial Union Assurance Holding SpA
Commercial Union Life Holding SpA
Commercial Union Vita SpA

MALAYSIA
Commercial Union Assurance (Malaysia) Sdn. Bhd.

NETHERLANDS
Amsterdamse Beleggings Associatie B.V.
B. Franco Mendes B.V.
Batvast BV
Commercial Union Capital BV
Commercial Union Finance BV
De Amsterdamsche Spaarkas NV
Dellvom B.V.
Delta Lloyd Bank NV
Delta Lloyd Beheer Maatschappij B.V.
Delta Lloyd Gezondheidszorgverzekeraar N.V.
Delta Lloyd Levensherverzekeringsmaatschappij B.V.

Delta Lloyd Levensverzekering N.V.
Delta Lloyd Schadeverzekering N.V.
Delta Lloyd Schadeverzekering Volmachtbedrijf B.V.
Delta Lloyd Vastgoed Fonds Frankrijk B.V.
Delta Lloyd Vastgoed Fonds Nederland B.V.
Delta Lloyd Vastgoed Leasing B.V.
Delta Lloyd Venture B.V.
Delta Lloyd Verzekeringsgroep N.V.
Delta Lloyd Woningbouw 1980 B.V.
Delta Lloyd Woningbouw 1982 B.V.
Delta Lloyd Woningbouw 1984 B.V.
Delta Lloyd Woningbouw B.V.
Delva 1 B.V.
Delva 2 B.V.
Delva 3 B.V.
Delva 4 B.V.
Delva 5 B.V.
Delva 7 B.V.
Delva 8 B.V.
Delva 9 B.V.
Delva 10 B.V.
Delva 11 B.V.
Delva 12 B.V.
Delva 13 B.V.
Delva 15 B.V.
Delva 17 B.V.
Delva 19 B.V.
Delva 20 B.V.
Delva 21 B.V.
Delva 22 B.V.
Delva 23 B.V.
Delva 24 B.V.
Delva 25 B.V.
Delva 26 B.V.
Delva 27 B.V.
Delva 28 B.V.
Delva 29 B.V.

Delva 30 B.V.
Diligentia Schadeverzekering N.V.
Fiscaal-Juridisch Adviesbureau Fides B.V.
Groest Delta B.V.
Hilvertshof BV
Hollandsche Societeit B.V.
Hollandsche Spaar Societeit N.V.
IBE Particas B.V.
Interjura N.V.
M. Boers & Zoon B.V.
Maatschappij Tot Exploitatie van Onroerende Goederen Wereldstad B.V.
Maatschappij Voor Modernen Woningbouw "Amsterdam" BV
Munthof B.V.
Nationaal Spaarfonds, N.V.
Nedlloyd Financieringen B.V.
Noord Braband Assurantiebedrijf B.V.
Noord Braband Schadeverzekering N.V.
Noord Braband Young Life B.V.
Noord-Braband Maatschappij Van Verzekering Op Het Leven, N.V.
Noord-Braband Woningbouw B.V.
Onroerend Goed Maatschappij Diemen 11 B.V.
Onroerend Goed Maatschappij Hertoghof 11 B.V.
Onroerend Goed Maatschappij Schokland 11 B.V.
Ontwikkelingsmaatschappij Gamma B.V.
Participatiemaatschappij Delta Lloyd B.V.
Participatiemaatschappij Delta-Lloyd Levensverzekering B.V.
Raet B.V.
Ridderkerk Winkel Centrum BV
Samod Assurantien B.V.
Schermer Assuradeuren B.V.
Vastgoed "Asparagus" BV
Vastgoed "Ebovo" B.V.
Vastgoed "Hektos" BV
Vastgoed Anch BV
Vastgoed de Koepel BV

Vastgoed G. Zoon & Co. B.V.
Vastgoed H. Van Saane B.V.
Vastgoed Hardt-Land B.V.
Vastgoed Havenwijck B.V.
Vastgoed Iber BV
Vastgoed Interbeek B.V.
Vastgoed Iwa BV
Vastgoed Jacobsstraat B.V.
Vastgoed Middenhoven B.V.
Vastgoed Nioet BV
Vastgoed Reinkenstraat
Vastgoed Sesemet BV
Vastgoed Terminal B.V.
Vastgoed Voorschoten B.V.
Vastgoed Westblaak B.V.
Woningbouw Zaanse Bedrijven B.V.
Zwolse Bouwmaatschappij B.V.

NEW ZEALAND

Commercial Union General Insurance Company Limited
Commercial Union Holdings (NZ) Limited
Commercial Union Travel Agencies New Zealand Limited (in liquidation)
Commercial Union Travel Insurance Company Limited
Creative Solutions Limited
Development and Motivation Systems Limited

POLAND

Commercial Union Towarzystwo Ubezpieczen Na Zycie (Polska) S.A.
WBK-CU British-Polish Financial Consultants Limited

THAILAND

Thai Charoen Sup Co. Limited

TURKEY

Commercial Union Hayat Sigorta A.S.
Commercial Union Sigorta A.S.

UNITED STATES
A.W.G. Dewar, Inc.
Travelsure Corporation

Overbrook Nominees, Ltd. and Strand Nominees, Ltd. are nominee pension funds under the management of Commercial Union Assurance Co. plc (one covering Commercial Union group employees in the United Kingdom and the other covering self-employed individuals).

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 406—August Term 1993

(Argued August 30, 1993 Decided March 4, 1994)

Docket No. 93-7537

COMMERCIAL UNION ASSURANCE CO. PLC, COMMERCIAL UNION PENSIONS MANAGEMENT, LTD., GEMINI OVERSEAS CORPORATION, MERCIA ZURICH, A.G., OVERBROOK NOMINEES, LTD., STRAND NOMINEES, LTD.,

Plaintiffs-Appellants,

—v.—

MICHAEL R. MILKEN, LOWELL J. MILKEN,

Defendants-Appellees.

Before:

FEINBERG, CARDAMONE, and ALTIMARI,

Circuit Judges.

Appellants, Commercial Union Assurance Co. plc, *et al.*, appeal from an order entered on May 5, 1993 and

final judgment entered on May 6, 1993, by the United States District Court for the Southern District of New York (Pollack, J.), granting defendants Michael Milken and Lowell Milken's motion for summary judgment on appellants' claims under § 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, § 12(2) of the Securities Act of 1933 as amended, 15 U.S.C. § 77l(2), and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, 1962 and 1964.

Affirmed.

GEORGE D. REYCRAFT, New York, New York (Debra Brown Steinberg, Cadwalader, Wickersham & Taft, New York, New York, of counsel), *for Plaintiffs-Appellants*.

MARK BELNICK, New York, New York (David L. Kornblau, Steven C. Herzog, Talitha Thurau, Steven Pacht, Paul, Weiss, Rifkind, Wharton & Garrison, New York, New York; Michael O. Finkelstein, Lord, Day & Lord, Barrett Smith, New York, New York, of counsel), *for Defendants-Appellees*.

CARDAMONE, *Circuit Judge*:

This appeal is from a grant of summary judgment to defendants in an action in which plaintiffs asserted that

defendants had violated the securities laws and civil RICO. We recognize there are legal actions that serve to punish or deter defendants or to determine property rights. But the signature of the causes of action before us is harm to plaintiffs: actual damages or consideration paid in the securities laws actions, and injury to plaintiffs' business or property in the RICO cause of action. Here plaintiffs, who are investors, may have feared they would suffer harm, but they actually suffered no out-of-pocket loss since their investments were fully repaid, plus interest. Thus, while we have no difficulty in finding that plaintiffs' causes of action might well subject defendants to liability, plaintiffs can prove no damages.

Plaintiffs-appellants are Commercial Union Assurance Co. plc, Commercial Union Pensions Management, Ltd., Overbrook Nominees, Ltd., Strand Nominees, Ltd., Gemini Overseas Corporation, and Mercia Zurich, A.G. (collectively appellants). They appeal from an order entered on May 5, 1993 and final judgment entered on May 6, 1993, by the United States District Court for the Southern District of New York (Pollack, J.), granting defendants Michael Milken and Lowell Milken's motion for summary judgment on appellants' claims under § 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b) (1988), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5 (1993); § 12(2) of the Securities Act of 1933 as amended, 15 U.S.C. § 77l(2) (1988); and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961, 1962 and 1964 (1988 & Supp. II 1990). Although we affirm the district court's grant of summary judgment to defendants, our rationale for doing so is different.

BACKGROUND

We review the background briefly. In March 1986 Ivan F. Boesky, the now notorious takeover-stock speculator, reorganized the form of his risk-arbitrage business from a corporation to a limited partnership. The new partnership, known as Ivan F. Boesky & Co., L.P. (the name has subsequently been changed to CX Partners, L.P.), was financed by a large debt offering and the private placement of $250 million in limited partnership interests. Because of the highly volatile nature of the risk-arbitrage business, the prospectus for limited partners cautioned prospective purchasers that the investment entailed a high degree of risk. Potential investors were required to submit investor suitability questionnaires prior to purchasing their interests. The questionnaire inquired as to whether the investor understood the nature and risks associated with the investment, explained that there was no guarantee of any financial return and that a limited partnership was not a liquid asset and should not be relied upon for current needs or personal contingencies.

Working closely with Boesky on the reorganization was Drexel Burnham Lambert Incorporated (Drexel), and appellee Michael Milken. The now-defunct Drexel was at the time the preeminent underwriter of high-yield—so-called "junk"—bonds. Milken was the Senior Vice President and Manager of Drexel's High Yield and Convertible Bond Department that handled the Boesky reorganization. Appellee Lowell Milken, Michael Milken's brother, also a Drexel employee in the same department, assisted his brother generally and on the Boesky deal in particular. For the underwriting services associated with placing the debt portion of the reorganization, Drexel charged Boesky $26.6 million. This fee was paid partly in

cash and partly by Drexel taking an equity interest in the partnership. Drexel was also a major purchaser of partnership interests.

Meanwhile, on March 21, 1986 appellants purchased a total of approximately $10.5 million of the partnership interests directly from Boesky's employees, without Drexel's assistance. Specifically, Commercial Union Assurance Co. plc, Commercial Union Pensions Management, Ltd., Overbrook Nominees, Ltd., Strand Nominees, Ltd. (collectively Commercial Union) purchased $7,503,175, Gemini $1,001,927, and Mercia Zurich $2,006,572. Appellants' purchases represented 4.2 percent of the total capital raised by the partnership.

Several months later, in November 1986, the government disclosed that Boesky had entered into a plea and cooperation agreement related to his insider trading activities. Professor David R. Herwitz of the Harvard Law School was appointed liquidation trustee of the partnership. As one might expect, in March 1987 appellants along with nearly two score originally named-plaintiffs, none of whom are appealing, filed their initial complaint against Boesky, Drexel and others, seeking to recover the capital they had invested. About two years later, in June 1989, after further public revelations of the insider trading scandal, the present complaint was amended by the addition of defendants-appellees Michael and Lowell Milken.

Appellants' claims were grounded on alleged violations of § 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5; § 12(2) of the Securities Act of 1933 as amended, 15 U.S.C. § 77l(2); and on the Racketeer Influenced and Corrupt Organizations Act,

18 U.S.C. §§ 1961, 1962 and 1964. The crux of appellants' theory seeking recovery against the defendants is that had they known about the criminal activity of Boesky and the Milkens—which we need not recount—they would not have purchased their partnership interests.

Six months after the Milkens were joined in the complaint, appellants began receiving cash payments resulting from their ownership of partnership interests. On January 7, 1990 Professor Herwitz distributed nearly the full amount of their invested capital. More precisely, Commercial Union received $7,482,189, about $21,000 less than its investment of $7,503,175. Gemini and Mercia Zurich received the exact amounts of their investments. A subsequent distribution on December 2, 1991 returned an additional $1,092,116, a yield of 10.2 percent on appellants' invested capital. A third-party settlement of $463,934 made on October 7, 1991 yielded 4.4 percent to appellants on their capital investment. A *de minimis* distribution was made on April 9, 1992. Thus, appellants have received $12,047,076, or 114.6 percent of their initial capital investment and they still own their partnership interests. Our calculations reflect only payments made to those appellants presently before us, therefore they differ slightly from those of the district court.

Throughout this period Michael Milken was attempting to resolve the criminal charges the government had brought against him. On April 24, 1990 he pled guilty to six felony charges, including conspiracy to violate the federal securities laws, securities fraud, mail fraud, and assisting in the filing of a false tax return. In conjunction with this plea, Milken agreed to pay $400 million to a restitution fund created in settlement of the Securities and Exchange Commission's (SEC) civil enforcement action, and a $200 million criminal fine.

In an attempt to resolve the pending civil litigation, in March 1992 Milken and his brother entered into a complex settlement arrangement (Global Settlement) with plaintiffs, substantially funded by $500 million contributed by Milken. Appellants, as was their privilege, opted out of this settlement and elected to pursue their then pending litigation against defendants. Accordingly, the district court instructed them to file an amended complaint that would identify the parties and claims severed from the original complaint, and to file a statement in support of their RICO claim against defendants.

At the time when this appeal was heard defendants had not answered the amended complaint. Milken has filed a general denial and admitted the facts both as stated in his criminal allocution and in a letter from his attorney to the sentencing judge. Milken also raised four affirmative defenses. Lowell Milken has also filed a general denial, asserted his Fifth Amendment privilege and raised 12 affirmative defenses. It is on this amended complaint (a 314-page opus) that defendants moved for summary judgment. On April 30, 1993 while this motion was pending, and following instructions from the district court, appellants filed a new amended complaint. Neither the Milken defendants nor Boesky have been deposed in the instant action due to a discovery stay issued by the district court.

In a reported decision, *Commercial Union Assurance Co. v. Ivan F. Boesky & Co.*, 824 F. Supp. 348 (S.D.N.Y. 1993), Judge Pollack granted summary judgment to defendants and dismissed appellants' complaint. He also invited defendants to seek Rule 11 sanctions against appellants, but stayed his decision on the sanctions pending the outcome of this appeal. From the grant of summary judgment this appeal ensued.

DISCUSSION

We review a district court's grant of summary judgment *de novo*, assessing the record in a light most favorable to the nonmoving party, *see Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir.), *cert. denied*, 112 S. Ct. 152 (1991), and applying the same standard as that applied by the district court, *see Burtnieks v. City of New York*, 716 F.2d 982, 985 (2d Cir. 1983). Under Fed. R. Civ. P. 56(c) summary judgment should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

I Appellants' RICO Claim

The RICO claim was dismissed by the district court on alternative grounds: one on a finding that appellants had not suffered compensable damages under RICO, and the other based on a legal ruling that the claim was insufficient on its face because the existence of an ongoing enterprise separate and apart from the purported pattern of activity asserted had not been pleaded. *See Commercial Union*, 824 F. Supp. at 350. Dismissal of the RICO claim must be affirmed because appellants' claim lacks that most fundamental of legal elements necessary to support a viable cause of action—any demonstrable damages.

As an initial matter, we reject appellants' contention that the payments by Professor Herwitz were settlements and not a return of appellants' capital investment. This conclusion is warranted given that the monies paid to appellants derived directly from the proceeds of the sale of assets held by the partnership, as appellants' counsel conceded. The complex "settlement" appellants constantly

refer to was simply a reordering of partnership interests to facilitate the Boesky partnership liquidation.

The need to classify the distributions made to appellants is apparent, given the statutory basis for their claim. Civil RICO provides a treble-damages remedy, but that remedy only inures to persons who have been "injured in [their] business or property by reason of" a RICO violation. 18 U.S.C. § 1964(c). *See Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1100 (2d Cir. 1988) ("plaintiff [must] suffer injury in fact"), *cert. denied*, 490 U.S. 1007 (1989); *see also Sedima, S. P. R. L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) (a RICO plaintiff "only has standing if, and can only recover to the extent that, he has been injured"). Appellants' principal contention is that they are entitled to a trebling of their damage award *before* any offset through settlements, restitution, recoupment or otherwise. This proposition ignores controlling precedent and mischaracterizes the monies distributed to them.

We recently ruled that after a RICO claim has been successfully collected it is "abated *pro tanto*, prior to any application of trebling." *Stochastic Decisions, Inc. v. DiDomenico*, 995 F.2d 1158, 1166 (2d Cir.), *cert. denied*, 114 S. Ct. 385 (1993). In *Stochastic*, plaintiff held several outstanding state-court judgments against the defendants, which defendants had artfully avoided paying through the use of fraudulent transactions. Plaintiff brought a civil RICO action and argued that it was entitled to a trebling of the amount of the outstanding judgments based on the amount outstanding at the time it brought its claim. We refused to award treble damages because collection of the claims had not been frustrated when litigation began. *See id.*

Appellants' RICO claim in this case is strikingly similar. They assert they are entitled to a trebling of the full amount of their invested capital ($10.5 million), none of which had been returned when they initiated suit. But, as related, they have now recouped not only their initial investment, but also have received 10.2 percent return on their capital, exclusive of additional funds paid to them as the result of several third-party settlements. Appellants' recovery stands in contrast to the risks—of which they were advised in the prospectus and investor suitability questionnaire—entailed in the purchase of the partnership interests. If a portion or all of their investment in the partnership was unrecoverable, a treble damage award might be appropriate, assuming the other RICO requirements were satisfied. But damages as compensation under RICO § 1964(c) for injury to property must, under the familiar rule of law, place appellants in the same position they would have been in but for the illegal conduct. Here appellants have already been placed by defendants in that position. Hence, in the instant case, without provable damages, no viable RICO cause of action may be maintained.

Appellants' reliance on *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1310 (7th Cir. 1987), *cert. denied*, 492 U.S. 917 (1989), and other similar non-controlling cases is misplaced. *Liquid Air* was considered and distinguished in *Stochastic*, *see* 995 F.2d at 1166, and is equally unavailing here. The defendants in *Liquid Air* returned the property at issue *after* a RICO judgment had been entered against them. *See* 834 F.2d 1310. Appellants in the case at hand received their capital investment back in full less than ten months from the time they commenced suit. We recognize that some cases cited by appellants suggest that trebling *prior* to any offset is appropriate given the

punitive and remedial role of treble damages. Nevertheless, we are disinclined to permit the trebling of damages by upholding a non-viable lawsuit.

Since we affirm the grant of summary judgment to defendants on appellants' RICO claim, we need not discuss the district court's alternative holding dismissing the RICO cause of action because it failed to allege an ongoing criminal enterprise, separate and apart from the purported pattern of activity asserted.

II Appellants' 10b-5 Cause of Action

We turn next to consider appellants' 10(b)-5 claim. Damage is an element of a 10b-5 cause of action that seeks a monetary award. *See Royal Am. Managers, Inc. v. IRC Holding Corp.*, 885 F.2d 1011, 1015 (2d Cir. 1989). As appellants recognize, they have not suffered any direct pecuniary loss under 10b-5 for the reasons discussed with respect to the RICO claim. Accordingly, in an attempt to satisfy this element and rehabilitate their 10b-5 claim, they have set forth three alternative theories: out-of-pocket, benefit-of-the-bargain, and disgorgement damages.

A. *Out-of-Pocket Damages*

Given appellants' recovery of their capital investment plus interest, their out-of-pocket theory damage calculation relies on the inclusion of a presumed award of nine percent prejudgment interest for the four years that have passed since they instituted this action against appellees. The 14.6 percent return received by appellants struck the trial court as a suitable prejudgment interest substitute. Ruling that appellants were not entitled to any further prejudgment interest in their Rule 10b-5 cause of action, the

district court dismissed this claim. *See Commercial Union*, 824 F. Supp. at 350.

The decision whether to award prejudgment interest and its amount are matters confided to the district court's broad discretion, and will not be overturned on appeal absent an abuse of that discretion. *See Rolf v. Blyth, Eastman Dillon & Co.*, 637 F.2d 77, 86 (2d Cir. 1980). Here, the trial court's decision is examined in light of the fact that its determination effectively and entirely foreclosed appellants' Rule 10b-5 cause of action. Defendants insist the prejudgment interest issue is irrelevant because there is no judgment on which to base an award of such interest. While initially attractive, this argument is simplistic. Appellants aver the lack of return on their capital investment *is the damage* they have incurred. Because lack of return is the kind of rationale usually relied on for awarding prejudgment interest, we must analyze the district court's disposition using the guides for determining whether or not to make an award of prejudgment interest.

A decision to award prejudgment interest "should be a function of (i) the need to fully compensate the wronged party for actual damages suffered, (ii) considerations of fairness and the relative equities of the award, (iii) the remedial purpose of the statute involved, and/or (iv) such other general principles as are deemed relevant by the court." *Wickham Contracting Co. v. Local Union No. 3, IBEW*, 955 F.2d 831, 833-34 (2d Cir.), *cert. denied*, 113 S. Ct. 394 (1992). The district court summed up its reasons for denying any further interest as follows:

> The present overblown complaint and the circumstances involved in this litigation commencing with the first and continuing through the fifth amended complaint are such that

> fundamental considerations of fairness and litigative propriety and normal restraint warrant the Court in the exercise of an informed discretion to deny the grant of an overlay of interest on the original investment on top of the 14.6 percent addition which the [appellants] have received on their capital investment. What has been repaid to the [appellants] more than adequately satisfies any equitable demand for interest on the capital recovery. . . .

Commercial Union, 824 F. Supp. at 350. This reasoning may not be said to constitute an abuse of discretion.

In deciding whether an award of prejudgment interest is warranted, it must be remembered that this is an equitable remedy and courts must be careful that an award does not overcompensate a plaintiff. *See Wickham Contracting Co.*, 955 F.2d at 834. Clearly the investment in the Boesky partnership was extremely risky, one where the investors might well have lost their capital, even absent any wrongful conduct by defendants. Appellants were fully aware of the risk and chose to invest in spite of it.

Appellants accuse the district court of "work[ing] backwards" to arrive at an interest rate of 3.8 percent per annum when the proper rate should be 9 percent—the statutory rate under New York law. They declare our decision in *Norte & Co. v. Huffines*, 416 F.2d 1189 (2d Cir. 1969) (per curiam), *cert. denied*, 397 U.S. 989 (1970), requires the trial court to make specific findings before departing from the statutory rate. This reading of *Norte* is too sweeping. To the contrary, we there instructed the district court to make findings in *that* particular case of the personal wrongdoings of defendants. *See id.* at

1191-92. Setting the rate of interest is another component of a district court's equitable discretion when it awards prejudgment interest.

Appellants rely on *Myron v. Chicoine*, a Seventh Circuit decision suggesting that "an award of prejudgment interest is particularly appropriate in cases involving investment fraud." 678 F.2d 727, 733 (7th Cir. 1982). This reliance ignores the fact that appellants received a return on their investment that may fairly be characterized as an interest award for purposes of Rule 10b-5. Further, in an attempt to imply a bias on the part of the district judge, appellants assert the denial of additional interest was related to their decision to opt-out of the Global Settlement. No evidence in the record supports this assertion and it is not apparent from a reading of the district court's opinion, as appellants suggest. Any such motivation would of course be improper and beyond those factors a trial judge may consider when determining whether or not to award prejudgment interest. *See Wickham Contracting Co.*, 955 F.2d at 833-34. No such basis appears from the present record. Thus, the out-of-pocket theory does not help appellants establish an entitlement to damages.

B. *Benefit-of-the-Bargain Theory*

The benefit-of-the-bargain theory is equally unavailing. Benefit-of-the-bargain damages in a Rule 10b-5 action are not available unless they can be calculated with reasonable certainty. *See Barrows v. Forest Labs., Inc.*, 742 F.2d 54, 59-60 (2d Cir. 1984). Appellants rely primarily on *Osofsky v. Zipf*, 645 F.2d 107 (2d Cir. 1981), for the proposition that benefit-of-the-bargain damages are readily available in a Rule 10b-5 action. Yet, in *Barrows* we read *Osofsky* as establishing the "reasonable certainty" requirement. *See Barrows*, 742 F.2d at 60 ("The holding

of *Osofsky* . . . turn[s] . . . on the distinction between damages that are speculative and those which are certain."); *see also Levine v. Seilon, Inc.*, 439 F.2d 328, 334 (2d Cir. 1971) (governing rule under 10b-5 is "that a defrauded buyer of securities is entitled to recover only the excess of what he paid over the value of what he got, not, as some other courts had held, the difference between the value of what he got and what it was represented he would be getting").

In this case, appellant buyers of partnership interests cannot demonstrate to a "reasonable certainty" what the benefit of their bargain was or what it should have been. They maintain that damages could be calculated by "extrapolation of the returns the Partnership *would have earned* from March 21, 1986 through January 7, 1990, based on evidence of the returns the Partnership actually earned during its first three months of operations, supported by evidence of returns paid by *other* arbitrage firms during that same period." On its face, there is nothing "reasonably certain" about any computation from this extrapolation. The concept of recovery of damages for a benefit-of-the-bargain is founded on the agreement made, not on a proposed hypothetical agreement built on outside evidence and on speculation regarding what the parties might have done or received had the circumstances surrounding the agreement been different. *See Barrows*, 742 F.2d at 60. Accordingly, appellants' "extrapolation" cannot be the basis for a Rule 10b-5 damage award founded on a benefit-of-the-bargain theory.

C. *Disgorgement*

Appellants' disgorgement theory, which was not addressed by the district court, is similarly without merit. To recover under such a theory appellants would have to

prove that defendants' alleged illegal profits from appellants' $10.5 million investment exceeded the amount appellees have thus far disgorged. Since Michael Milken has agreed to pay a total of $1.1 billion, the disgorgement theory borders on the frivolous. *See, e.g., Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc.*, 734 F. Supp. 1071, 1076 (S.D.N.Y. 1990) ("[O]nce ill-gotten gains have been disgorged to the SEC, there remains no unjust enrichment and, therefore, no basis for further disgorgement in a private action.").

III Appellants' § 12(2) Claim

For the same reasons as those discussed with respect to appellants' RICO and Rule 10b-5 claims, appellants have not suffered compensable damages under § 12(2) of the Securities Act of 1933. While the district judge held defendants were not statutory sellers for purposes § 12(2), *see Commercial Union*, 824 F. Supp. at 351, we can affirm on the alternative damages ground since the parties argued the damages issue in the district court and briefed it before us, *see Viacom Int'l Inc. v. Icahn*, 946 F.2d 998, 1000 (2d Cir. 1991) (affirming on grounds other than those relied upon by the district court), *cert. denied*, 112 S. Ct. 1244 (1992).

Section 12(2) states that a party "may sue . . . to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security." 15 U.S.C. § 77l(2). Because appellants admittedly still own the partnership interests, their remedy, if any, is rescission. *See Randall v. Loftsgaarden*, 478 U.S. 647, 655 (1986). Under the rescissory measure of damages appellants would be

entitled to a return of the consideration paid for the partnership interests plus prejudgment interest, less any income received on the interests. *See id.* at 656.

Appellants' § 12(2) claim fails for substantially the same reasons as their RICO and Rule 10b-5 claims. They paid $10.5 million for their interests and the district court determined they were only entitled to the 14.6 percent return on their investment. We realize that Congress specifically provided in § 12(2) for an award of interest. But we do not read § 12(2) as insisting upon any set rate of interest. Rather—as in the Rule 10b-5 context—under § 12(2) an award of prejudgment interest rests in the sound discretion of the trial court after careful consideration of the factors set forth in *Wickham Contracting Co.*, 955 F.2d at 833-34.

In sum, appellants' total damages are $12,047,076 (their original investment plus 14.6 percent interest), which must then be offset by appellants' recovery of that amount from the distributions made by Professor Herwitz and the third-party settlements received. *See Randall*, 478 U.S. at 660 (noting that an "implicit offset for a return of consideration . . . confined to the clear case in which such money or property is returned to the investor" would be proper under § 12(2)). The net result of these computations is that appellants have not suffered compensable damages under § 12(2). Allowing them to maintain a cause of action under such circumstances would constitute a waste of judicial resources and a thwarting of Congress' aim in enacting § 12(2). *See* H.R. Rep. No. 85, 73d Cong., 1st Sess. 9 (1933) (under § 12 the buyer can "sue for recovery of his purchase price, or for damages not exceeding such price") (*quoted in Randall*, 478 U.S. at 656).

Nonetheless, we must say that had appellants suffered compensable damages, their cause of action, contrary to the district court's view, would have been sufficient to withstand a motion for summary judgment. Privity between the buyer and seller is no longer required in a § 12(2) action. *See Pinter v. Dahl*, 486 U.S. 622, 646 (1988) (broker acting as agent for seller is liable as statutory seller within meaning of § 12(2)); *Wilson v. Saintine Exploration & Drilling Corp.*, 872 F.2d 1124, 1126-27 (2d Cir. 1989). Since appellants did not purchase the interests directly from Drexel or the Milkens, defendants will be liable under § 12(2) only if they "solicited" the sale. As the Supreme Court teaches, the term seller includes the person "who successfully solicits the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner." *Pinter*, 486 U.S. at 647; *see also Wilson*, 872 F.2d at 1125 ("statutory sellers [are] only those who actually solicit the sale of securities for financial gain"). At the other end of the liability spectrum, the Supreme Court in *Pinter* stated that "§ 12's failure to impose express liability for mere participation in unlawful sales transactions suggests that Congress did not intend that the section impose liability on participants collateral to the offer or sale." 486 U.S. at 650.

In *Wilson*, grappling with the line drawn by *Pinter*, we ruled that a law firm that performed strictly ministerial acts was "collateral" to a transaction, but "brokers who might act on the seller's behalf for a profit" could be liable. *Wilson*, 872 F.2d at 1126-27. In any event, regardless of where the line is drawn exactly, there exists a material issue of fact as to defendants' role in appellants' purchases of the partnership interests sufficient to defeat a summary judgment motion. This conclusion finds further support in the fact that appellants never had the

opportunity to depose either Boesky or the Milkens. But because appellants have no compensable damages, the grant of summary judgment on the § 12(2) claim must be affirmed on that ground rather than on the district court's incorrect reasoning that no question of fact existed as to whether defendants were statutory sellers for § 12(2) purposes.

CONCLUSION

Consequently, for the reasons stated, the judgment of the district court is affirmed.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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87 Civ. 1865 (MP)
Filed May 3, 1993

COMMERCIAL UNION ASSURANCE CO., PLC; Commercial Union Pensions Management, Ltd.; Gemini Overseas Corporation; Lewis E. Lehrman, Mercia Zurich, A.G., Overbrook Nominees, Ltd., and Strand Nominees, Ltd.,

Plaintiffs,

—v.—

IVAN F. BOESKY & COMPANY, L.P.; Seemala Partners, L.P.; Michael R. Milken; Lowell J. Milken; Dennis B. Levine; Seligmann, Harris & Co., Inc.,

Defendants.

Cadwalader, Wickersham & Taft by George D. Reycraft, Debra B. Steinberg, Michael Perino, New York City, for plaintiffs Commercial, Gemini, Mercia & Lehrman.

Paul, Weiss, Rifkind, Wharton & Garrison by Mark Belnick, David Kornblau, Steven Herzog, New York City, for defendant Michael Milken.

Lord Day & Lord, Barrett Smith by Michael O. Finkelstein, New York City, for defendant Lowell Milken.

DECISION

MILTON POLLACK, *Senior District Judge.*

The defendants Michael Milken and Lowell Milken move for summary judgment of dismissal of this suit pursuant to Rule 56, Federal Rules of Civil Procedure.

On March 21, 1986, plaintiffs invested a total of $11,511,674 in limited partnership interests in the Ivan Boesky and Co. L.P., a Delaware limited partnership formed on March 5, 1986 now known as CX Partners L.P., (the Partnership).

The investment was made through an unregistered private offering to reorganize and raise capital for Boesky's arbitrage operations which until then had been conducted through Boesky Corp.

On March 20, 1987 the original plaintiffs filed the initial complaint seeking to recover their invested capital alleging, in essence, that they were defrauded into purchasing their partnership interests.

Plaintiffs posited their claims on alleged violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder and on Section 12(2) of the Securities Act of 1933 as amended, and on RICO. All the original parties plaintiff in the suit other than the three or four now before the Court have settled their claims. The fifth amended complaint served by Court order on April 30, 1993 was severed from the earlier complaints and reflects the parties and claims severed from the original complaint and before the court on this motion.

Plaintiffs invested in the partnership capital the sum of $11,511,674 and claim that their investment was fraudulently induced in violation of the Federal securities laws mentioned above. The partnership has been liquidated and plaintiffs have been repaid a total of 114.6 percent of their capital investment, having received heretofore a total of $13,180,732 thereon, which is an amount of $1,680,704 in excess of the capital investment by the plaintiffs. Further distribution of

partnership funds may be made later this year by the liquidator.

Although the severed claims herein are asserted under Section 10(b), plaintiffs seek damages beyond their out-of-pocket capital investment which they already have recovered. They seek further remuneration under a benefit of the bargain theory, plus 9 percent prejudgment interest on their initial investment. Seemingly the plaintiffs seek the benefit of the very fraud from which they disassociate themselves. In reality they are claiming contract damages. The law does not furnish such damages under Section 10(b). *Levine v. Seilon Inc.*, 439 F.2d 328-34 (2nd Cir.1984); *Barrows v. Forest Laboratories Inc.*, 742 F.2d 54, 59-60 (2nd Cir.1984).

The present overblown complaint and the circumstances involved in this litigation commencing with the first and continuing through the fifth amended complaint are such that fundamental considerations of fairness and litigative propriety and normal restraint warrant the Court in the exercise of an informed discretion to deny the grant of an overlay of interest on the original investment on top of the 14.6 percent addition which the plaintiffs have received on their capital investment. What has been repaid to the plaintiffs more than adequately satisfies any equitable demand for interest on the capital recovery, *Rolf v. Eastman Dillon & Co.*, 637 F.2d 77, 87 (2nd Cir.1980).

There were approximately 43 plaintiffs who commenced this action; only seven names remain. The others dismissed their attorneys Cadwalader, Wickersham & Taft, and through other counsel have made their own arrangements in satisfaction of their claims.

The fifth amended complaint seeks a recovery against the defendants Milken by reason of the 10(b) claims mentioned above. The overextended allegations of the latest pleading in keeping with those which were served heretofore by the same law firm is forensically larded with allegations of misconduct of Boesky and his cohorts a vast distance from the fraudulent inducement of a purchase of a limited partnership interest.

That ploy does not serve to enhance the legal measure of damages applicable. Since the entire partnership capital investment was fully recovered before the fifth amended complaint was served on April 30, 1993, served by order of the Court to update the pleadings, the inclusion of the lurid historical content seems to be an attempted portrayal for some presumed coercive effect.

The addition of the civil RICO claim in the complaint is flawed by the absence of any foundation for a compensatory recovery and more particularly because it is insufficient in law on its face as well as in its particularization filed heretofore by Court order.

The claim entirely lacks the existence of an ongoing enterprise separate and apart from the purported pattern of activity asserted, as well as in respect to other failings, for the assertion of a cognizable civil RICO claim.

Section 12(2) of the '33 Act liability is by its terms limited to a person "who offers or sells" a security. Plaintiffs admit that neither of the defendants Milken actually solicited the purchases made by the plaintiffs; neither offered or actually passed title thereto, nor did either induce the purchases of any of the plaintiffs. They are not statutory sellers. Their inclusion in these claims was a known impropriety and this claim is dismissed, with prejudice.

CONCLUSION

The motion for summary judgment is granted in all respects and the severed fifth amended complaint with respect to the defendants Milken is dismissed with costs. In view of the very clear legal principles applicable to the Federal claims attempted to be asserted, the Court will consider an application from defendants for appropriate sanctions against the plaintiffs and their attorneys under the principles of Rule 11, Fed.R.Civ.P. on papers to be submitted within 10 days hereof to determine whether further costs to the moving defendants are warranted due to the oppressive and prolific litigative

conduct exhibited herein on the part of the plaintiffs and their counsel.

There is no reason for delay and the ongoing processing of the Drexel bankruptcy aspects of the global settlement should not be delayed and further hampered by this litigation and its conduct and the Clerk is accordingly directed in accordance with Rule 54(b) to enter final judgment against the above named plaintiffs in favor of the moving defendants.

SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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87 CIVIL 1865 (MP)

FILED MAY 6, 1993

COMMERCIAL UNION ASSURANCE CO., PLC; COMMERCIAL UNION PENSIONS MANAGEMENT, LTD.; GEMINI OVERSEAS CORPORATION; LEWIS E. LEHRMAN; MERCIA ZURICH, A.G.; OVERBROOK NOMINEES, LTD.; and STRAND NOMINEES, LTD.,

Plaintiffs,

—v.—

IVAN F. BOESKY & COMPANY, L.P.; SEEMALA PARTNERS, L.P.; MICHAEL R. MILKEN; LOWELL J. MILKEN; DENNIS B. LEVINE; SELIGMANN, HARRIS & CO., INC.,

Defendants.

JUDGMENT

Defendants Michael Milken and Lowell Milken having moved for summary judgment pursuant to Rule 56 of the Fed.R.Civ.P., and the said motion having come before the Honorable MILTON POLLACK U.S.D.J., and the Court thereafter on May 3, 1993, having handed down its order; granting defendants Michael Milken and Lowell Milken's motion for summary judgment, in all respects, and dismissing the

severed fifth amended complaint with respect to defendants Milken with costs, and the Court will consider an application from defendants for appropriate sanctions against plaintiffs and their attorneys under the principles of Rule 11, F.R.Civ.P. on papers to be submitted within 10 days hereof, and there being no just cause for delay and the ongoing processing of the Drexel bankruptcy aspects of the global settlement should not be delayed and further hampered by this litigation and its conduct, and accordingly, directing The Clerk of The Court to enter final judgment in accordance with Rule 54(b) against the above named plaintiff and in favor of the moving defendants, it is,

ORDERED, ADJUDGED AND DECREED: That defendants Michael R. Milken and Lowell J. Milken's motion for summary judgment be and it is hereby granted in all respects, and it is further,

ORDERED, the Court will consider an application from defendants for appropriate sanctions against the plaintiffs and their attorneys under the principles of Rule 11, Fed.R.Civ.P., on papers to be submitted with[in] 10 days, and it is further,

ORDERED, that the severed fifth amended complaint be and it is hereby dismissed as against defendants Milken, with costs for the reasons stated in the transcript of proceedings, dated May 3, 1993.

DATED: NEW YORK, NEW YORK
May 6, 1993

James M. Parkinson
Clerk

Ronald Church
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE
SECOND CIRCUIT

DOCKET NUMBER: 93-7537

FILED APRIL 21, 1994

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of April one thousand nine hundred and ninety-four.

COMMERCIAL UNION ASSURANCE CO. PLC, COMMERCIAL UNION PENSIONS MANAGEMENT, LTD., GEMINI OVERSEAS CORPORATION, MERCIA ZURICH, A.G., OVERBROOK NOMINEES, LTD., STRAND NOMINEES, LTD.,

Plaintiffs-Appellants,

—v.—

MICHAEL R. MILKEN, LOWELL J. MILKEN,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by

Plaintiffs-Appellants, Commercial Union Assurance Co. PLC, Commercial Union Pensions Management, Ltd., Gemini Overseas Corporation, Mercia Zurich, A.G., Overbrook Nominees, Ltd., Strand Nominees, Ltd.,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
GEORGE LANGE III, Clerk
By: CAROLYN CLARK CAMPBELL
Carolyn Clark Campbell
Chief Deputy Clerk

APPENDIX F

18 U.S.C. § 1964. Civil remedies

* * *

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

* * *

APPENDIX G

15 U.S.C. § 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

17 C.F.R. § 240.10b-5. Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

APPENDIX H

15 U.S.C. § 78t. Liabilities of controlling persons

(a) Joint and several liability; good faith defense

Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

(b) Unlawful activity through or by means of any other person

It shall be unlawful for any person, directly or indirectly, to do any act or thing which it would be unlawful for such person to do under the provisions of this chapter or any rule or regulation thereunder through or by means of any other person.

APPENDIX I

15 U.S.C. § 77*l*. Civil liabilities arising in connection with prospectuses and communications

Any person who—

* * *

> (2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

APPENDIX J

15 U.S.C. § 77o. Liability of controlling persons

Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any persons liable under sections 77k or 77*l* of this title, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.